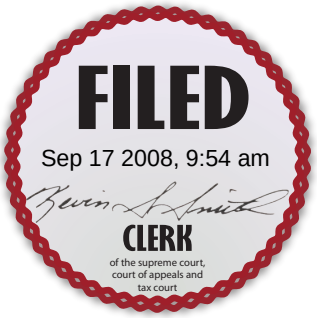

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IN THE
COURT OF APPEALS OF INDIANA

CHAD STEWART,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0803-CR-288
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0701-FC-2

September 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Chad Stewart appeals his sentence for Class C felony operating a motor vehicle after forfeiture for life. We affirm.

Issues

Stewart raises two issues, which we restate as follows:

I. whether the trial court abused its discretion when sentencing Stewart; and

II. whether Stewart's six-year sentence is inappropriate in light of the nature of the offense and his character.

Facts

On January 10, 2007, Stewart was convicted for Class C Felony operating a motor vehicle after driving privileges were forfeited for life. At twenty-five years of age, he has committed multiple offenses related to this conviction. Stewart has five previous convictions directly related to the instant offense: three convictions for Class C Misdemeanor operating a vehicle while never receiving a license and two convictions for Class D Felony operating a vehicle after being adjudged a habitual traffic offender.

The first two of Stewart's related convictions were operating a vehicle while never receiving a license. For both sentences, the trial court suspended his jail time and placed him on unsupervised probation for one year. Stewart violated his probation each time. Stewart's third related conviction was another operating a vehicle while never receiving a license. Despite the repeated offenses, the trial court sentenced Stewart to sixty days in jail. He was also ordered to obtain a valid driver's license, but he did not comply with that order.

Stewart's fourth related conviction was Class D Felony operating a vehicle after being adjudged a habitual traffic offender; this time the trial court ordered him to serve three years in the Department of Correction, but suspended two and a half years of his sentence to probation. The trial court also suspended Stewart's driving privileges for life. Stewart again violated the terms of his probation. Stewart's fifth related conviction was his second Class D Felony operating a vehicle after being adjudged a habitual traffic offender; the trial court sentenced him to eight months in jail, and reaffirmed his driving privileges were suspended for life.

At the sentencing hearing on this matter, Stewart stated he repeatedly drove without a license because he could not read well due to a learning disability. He implied he could not pass the written portion of the driving test. The trial court found Stewart's lengthy criminal history involving driving without a license, that he was on probation at the time of his arrest, and that he scored low on the Level of Service Inventory-Revised (LSI-R) test as aggravating factors, and found Stewart's learning disability and the fact that incarceration would bring hardship to his family as mitigators. The court found the aggravating factors outweighed the mitigating factors and sentenced Stewart to six years, with three years executed at the Department of Correction, and three years at Tippecanoe County Community Correction. Stewart now appeals his sentence.

Analysis

I. Abuse of Discretion

Stewart argues the trial court abused its discretion when it considered his lengthy criminal history as a significant aggravator. He argues his history involving driving without

a license is already a material element of the offense and relies on Burges v. State, 854 N.E.2d 35, 41 (Ind. Ct. App. 2006), which held material elements of offenses cannot also be applied as aggravators. However, the law in Burges, at least in this regard, no longer applies.

Prior to 2005, trial courts were required to start at a presumptive, or fixed, number of years for a given crime when determining an offender's sentence. Pedraza v. State, 887 N.E.2d 77, 79 (Ind. 2008). The fixed number of years would be increased or decreased based on aggravating and/or mitigating circumstances. Id. If a court did not find any aggravators or mitigators, the court was required to impose the presumptive sentence. Id. In 2005, this sentencing scheme was found unconstitutional, and it was revised by the General Assembly. Id.

The post-2005 sentencing scheme allows a trial court to sentence a defendant within a range of years for a given crime, but suggests an "advisory" term of years for the crime. Id. The trial court can sentence a defendant anywhere within that range of years. Id. Aggravating and mitigating circumstances are no longer required to reduce or enhance a sentence; however, in practice they are still considered by a trial court to determine the appropriate sentence. Id.; see also Ind. Code § 35-38-1-7. For a felony offense, a trial court is required to issue a sentencing statement that includes a reasonably detailed recitation of the trial court's reasons for the sentence imposed. Anglemyer v. State, 868 N.E.2d 482, 485 (Ind. 2007). On appeal, a sentence will be reviewed for an abuse of discretion. Id. "An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts

and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." Id. at 490.

Our supreme court recently held double enhancements are not necessarily inappropriate in Indiana's current criminal sentencing scheme. Pedraza, 887 N.E.2d At 80.

> Indiana sentencing used to be a two-step process-imposing of the presumptive sentence, then deciding whether any aggravators or mitigators warranted deviation. After the 2005 modifications, it consists of only one discretionary determination. Thus, a sentence toward the high end of the range is no longer an "enhanced sentence" in the sense that the former regime provided. Moreover, while the trial court must still list in its sentencing statement those reasons it finds relevant to the sentence, the correlation between those factors and the given sentence is not as precisely tailored as it was under the presumptive sentencing scheme . . . .

Id. at 80. For these reasons, where a prior conviction is an element of an offense, the prior conviction now also may be used as an aggravator. Id. For the same reasons, the trial court did not abuse its discretion when it considered Stewart's prior traffic-related offenses as aggravators.

II. Inappropriateness

Stewart next claims his sentence is inappropriate in light of his character. Indiana Appellate Rule 7(B) provides, "[a]n appellate court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Although we do not have to be "very deferential" to the trial court or review sentences with "great restraint," we must and should exercise deference to a trial court's

sentencing decision because the language in 7(B) requires us to give "due consideration" to that decision, and we understand and recognize the unique perspective a trial court brings to its sentencing decisions. See Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. See id.

Stewart argues his sentence is inappropriate because he is not a "typical" lifetime-suspension offender, and because of that the sentence imposed by the trial court was too harsh. Stewart argues unlike "typical" lifetime offenders, he has no history of dangerous or impaired driving. We do not find the nature of the offense to be particularly egregious. However, when examining Stewart's character we find he has a history of difficulty with the law. The significance of a criminal history in assessing a defendant's character and appropriate sentence varies based on the nature, gravity, and number of prior offenses in relation to the current offense. Rutherford v. State, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). In addition to the prior related offenses already mentioned, Stewart has non-traffic related convictions.[1] He argues the non-traffic portion of his criminal history is "too petty and stale to carry any meaningful weight . . . ." (Appellant's Br. p. 7).

We do not accord significant weight to the non-traffic portion of Stewart's criminal history, as they are unrelated to the current offense. However, having a "petty and stale" criminal history is not the same as having no criminal history. We do give significant

[1] Stewart has prior misdemeanor convictions for possession of a handgun without a license and minor consumption. In addition to his prior convictions, he has had eight petitions to revoke probation filed against him, with five being found true and one pending. He also has several failures to appear.

weight to the numerous prior offenses and probation violations directly related to the current offense. Based on Stewart's record, prior leniency has not worked for him. He has had numerous probation violations, a number of failures to appear, and several convictions for the same offense. We note that Stewart had more convictions than needed to support the C felony conviction. He was shown leniency when convicted of the second D felony after he already had a lifetime suspension of his driving privileges.

Stewart also argues he is a safe driver and that warrants a lesser sentence. We disagree. If we excused anyone who claimed to be a safe driver to drive without a license after multiple offenses, lenient sentences, and probation violations, we contravene a law that exists to protect our citizens. Even if Stewart claims to be a safe driver, he conceded he drove without insurance, which is hazardous to himself, other drivers, and the community.

In regard to mitigating factors, a court should carefully consider on the record what weight to give a potential mitigating factor. See Smith v. State, 770 N.E.2d 818, 823 (Ind. 2002). There is no obligation to give the evidence the same weight the defendant urges. Id. We have considered Stewart's reasoning for driving without a license with his learning disability. We empathize with Stewart in his inability to read well, but we do not find that argument convincing. Stewart could have pursued other means to get to work, such as public transportation. Perhaps if Stewart has been successful at staying gainfully employed, we do not believe Stewart could not at the very least have sought help for his learning disability. There is nothing in the record that demonstrates Stewart attempted to seek the help he needed.

Had Stewart received a maximum sentence, it is possible we would find his sentence warranted revision. "Maximum sentences ordinarily are appropriate for the 'worst' offenders and offenses." Marlett v. State, 878 N.E. 2d 860, 865 (Ind. Ct. App. 2007). trans. denied. However, Stewart did not recieve the maximum sentence. The advisory sentence for a class C felony is four years imprisonment, while the maximum sentence is eight years. See I.C. § 35-50-2-6(a). Stewart received a total of six years, with three years executed at the Department of Correction, and three years in Community Correction. We are not convinced Stewart's sentence is inappropriate.

Conclusion

The trial court did not abuse its discretion when it considered Stewart's multiple prior offenses as aggravators, and his sentence is appropriate in light of the nature of the offense and his character. We affirm.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.